STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

JOAN M. GLASS,

Plaintiff-Appellant,

v

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Defendants-Appellees.
_____/

Supreme Court Docket No. 126409

Court of Appeals Docket No. 242641

Alcona Circuit Court No. 01-10713-CK

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BRIEF OF AMICI CURIAE MICHIGAN CHAMBER OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, MICHIGAN BANKERS ASSOCIATION, AND MICHIGAN HOTEL, MOTEL & RESORT ASSOCIATION

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STATEMENT OF BASIS OF JURISDICTION

Amici Curiae adopt Appellees' Statement of Basis of Jurisdiction.

STATEMENT OF QUESTION PRESENTED

I. UNDER MICHIGAN LAW, DO OWNERS OF PROPERTY ABUTTING THE GREAT LAKES HOLD TITLE TO THE WATER'S EDGE FREE OF THE PUBLIC TRUST?

Trial Court's Answer:	No
Plaintiff-Appellant's Answer:	No
Defendants-Appellees' Answer:	Yes
Court of Appeals' Answer:	No
Amici's Answer:	Yes

STATEMENT OF FACTS

Amici Curiae adopt Appellees' Counter Statement of Facts.

INTEREST OF AMICI CURIAE

The Michigan Chamber of Commerce is a non-profit membership corporation that represents the interests and views of over 6,500 private corporations and businesses which are engaged in commercial, industrial, agricultural, civic and professional activities in Michigan.

The National Federation of Independent Business Legal Foundation is the legal arm of the National Federation of Independent Business, the nation's oldest and largest organization dedicated to representing the interests of small business owners throughout all 50 states. Of the NFIB's approximately 600,000 members, over 200,000 own retail and service establishments, including small resorts, hotels, restaurants and marinas, with many located in Michigan.

The Michigan Bankers Association is a professional association of over 200 Michigan financial institutions with more than 2,300 branches located throughout the state. Its member institutions provide a financial foundation for economic activity in the state so as to promote strong communities and economic development in Michigan.

The Michigan Hotel, Motel & Resort Association is a professional association whose members represent over 500 hotels, motels, resorts and bed and breakfasts located throughout the state. The association is engaged in the promotion of travel and tourism in Michigan.

Amici Curiae represent the interests and views of (1) owners of property along Great Lakes shorelines who use the property for private residential purposes, and commercial businesses such as motels, hotels and recreational resorts, (2) lenders who finance homes and businesses located along Great Lakes shorelines, and (3) businesses engaged in industrial, agricultural, civic, financial and professional activities in Michigan.

Amici Curiae are interested in the stability of longstanding rules of private property law, protecting existing private property rights and values, and minimizing the potential for further

litigation between owners of riparian lands along the Great Lakes shorelines and non-owners who seek to use or claim an interest in the area of the Great Lakes shorelines landward of the water's edge.

ORDER APPEALED FROM AND RELIEF REQUESTED

Plaintiff-Appellant ("Plaintiff") has been granted leave to appeal the May 13, 2004 published opinion of the Court of Appeals, *Glass* v *Goeckel*, 262 Mich App 29; 683 NW2d 719 (2004), which reversed the trial court's grant of summary disposition to Plaintiff and remanded for entry of an order granting Defendants-Appellees' ("Defendants") motion for summary disposition. By an order entered on November 19, 2004, this Court granted Defendants' motion to confirm that the issue of title to previously submerged lands will be heard by the Court and should be briefed by the parties.

The Court of Appeals' opinion included two principal holdings: (1) pursuant to *Hilt* v *Weber*, 252 Mich 198; 233 NW 159 (1930) and subsequent cases, riparian property owners on the Great Lakes have the right to exclusive use and enjoyment of their land to the water's edge and, therefore, the public has no right of passage over dry land between the low and high water mark; and (2) Part 325, Section 2 of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.32502,[1] does not modify, but rather affirms, the rule set forth in *Hilt* and subsequent cases.

Amici Curiae urge the Court to affirm the Court of Appeals' decision, but do so on the basis that *Hilt* and subsequent cases establish that Great Lakes riparian property owners not only have the right to exclusive use of their property to the water's edge, but in fact have *title* to their property to the water's edge, free of any public trust interest of the state in the submerged lands of the Great Lakes.

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[1] Part 325 of NREPA was formerly known as the Great Lakes Submerged Land Act (the "GLSLA"), MCL 322.701, *et seq.*, which was repealed by 1995 PA 59.

ARGUMENTS

I. UNDER MICHIGAN LAW, OWNERS OF PROPERTY ABUTTING THE GREAT LAKES HAVE TITLE TO THE WATER'S EDGE

A. The Michigan Supreme Court's *Hilt* v *Weber* Decision Controls This Case

In the landmark decision of *Hilt* v *Weber*, 252 Mich 198; 233 NW 159 (1930), this Court clearly and unambiguously held that shoreline property owners on the Great Lakes have title to the water's edge, at whatever stage:

> "The most ordinary effect of a large body of water is to change the shore line by deposits or erosion gradually and imperceptibly. In such cases it is the general, possibly universal, rule, except for the [now overruled] Kavanaugh Cases, and except in a few States where riparian rights have been extinguished by Constitution or statute, that the **title of the riparian owner follows the shore line under what has been graphically called 'a movable freehold.'**" *Hilt* at 219 (quoting 28 Halsbury, Laws of England, 361) [emphasis added].

As elaborated upon later in this brief, the *Hilt* decision also held that the public trust does not extend landward beyond the water's edge and applies only to submerged bottomlands of the Great Lakes. *Id.* at 224. The *Hilt* decision has been neither overturned nor criticized by any Michigan case since it was decided in 1930. In fact, this Court most recently affirmed the principle of riparian ownership to the water's edge, at whatever stage, in *Peterman* v *DNR*, 446 Mich 177; 521 NW2d 499 (1994). In *Peterman*, the court held that the riparian owner, and not the public, owned the beach between the water's edge and the ordinary high water mark: "**title of the riparian owner follows the shore line** under what has been graphically called a 'movable freehold.'" *Peterman* at 192 [emphasis added]. Based on *Hilt* and *Peterman*, Plaintiff's argument that the public has any ownership interest in Great Lakes' riparian property between the water's edge and the ordinary high water mark is untenable and must be rejected. The specific facts of *Hilt* further bear out this conclusion.

In *Hilt*, a land contract purchaser of shoreline property, in defending against foreclosure, asserted that the seller had misrepresented the property line as being located at a stake driven approximately 100 feet inland from the water's edge. Based on the court's holdings in *Kavanaugh* v *Rabior*, 222 Mich 68; 192 NW 623 (1923) and *Kavanaugh* v *Baird*, 241 Mich 240; 217 NW 2 (1928) (hereinafter the "*Kavanaugh Cases*"), the land contract purchaser argued that the "meander line"[2] was the actual boundary, which was located approximately 277 feet inland from the water's edge. In resolving this dispute, the *Hilt* court overruled the *Kavanaugh Cases*, holding that the boundary line of the riparian property extended to the water's edge – not the meander line – and so no damage had occurred.

The significance of the *Hilt* decision and its overruling of the *Kavanaugh Cases* cannot be overstated. Before the *Kavanaugh Cases*, it was understood that property owners along Michigan shorelines owned to the water's edge. The *Kavanaugh Cases* changed that by converting to public property Michigan's hundreds and hundreds of miles of shore.

Understandably, this dislodging of the bedrock foundation of Michigan's Great Lakes riparian jurisprudence caused a flurry of controversy and dispute, and both legislative and executive action. To resolve this rising conflict and to place the law back on its foundations, the Michigan Supreme Court promptly accepted the *Hilt* case for review:

> "Because of the conflict of authority, and also because the executive and legislative branches of the state government have felt the need of more precise statement of the legal situation as a basis of legislation, we finally determined upon a frank re-examination of the Kavanaugh cases. . . ." *Hilt* at 202.

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[2] A meander line, according to *Hilt*, is simply an approximation of a shoreline boundary for the purpose of computing the amount of acreage sold by the government, and was never intended to be a boundary in fact. *Hilt* at 204-206.

Recognizing that the *Hilt* case presented an issue of momentous importance to the state and its jurisprudence, the court accepted numerous briefs beyond those submitted by the parties, including briefs filed by the attorney general and others representing public and private interests as amici curiae. The court then carefully and methodically addressed all of the arguments that might be brought to bear on the issue, including an historical analysis of relevant federal and state decisions and consideration of the public trust doctrine, and set about to bring final resolution to the issue of Great Lakes' shoreline ownership in Michigan. As is discussed at length below, the court decided that, in the absence of condemnation and payment of just compensation by the state, the title of a riparian owner extends to the water's edge, and that the public trust covers only lands actually submerged by waters of the Great Lakes.

1. State And Federal Decisions Establish Title To The Water's Edge

From the outset, the *Hilt* court noted that even in the earlier, contrary case of *Kavanaugh* v *Baird, supra*, the court had acknowledged that "the decision was against the weight of authority, supported by the fact that the contrary authority is substantially unanimous, in state and federal courts, in this country and England." *Hilt* at 203. With specific regard to federal law, the court cited *St Paul & P Railroad Co* v *Schurmeier*, 74 US 272, 286; 19 L Ed 74 (1868) ("the water course, and not the meander-line, as actually run on the land, is the true boundary") and *Hardin* v *Jordan*, 140 US 371, 380; 11 S Ct 808, 811; 35 L Ed 428 (1891) ("the waters themselves constitute the real boundary"). Ultimately, after reviewing the decisions made by courts in other Great Lakes states, the court concluded that under federal law, "the purchaser from the government of public land on the Great Lakes took **title to the water's edge**." *Hilt* at 206 [emphasis added].

2. Michigan Law Defines Michigan Property Rights

The *Hilt* court next held that once Great Lakes' waterfront property was acquired by a private person, state law, and not federal law, controlled the extent of that person's rights: "The state law became paramount on the title after it vested in a private person." *Id.* (citing *Hardin* v *Jordan, supra*). This same conclusion holds true and remains the law today. *See Oregon* v *Corvallis Sand & Gravel Co*, 429 US 363, 372; 97 S Ct 582; 50 L Ed 2d 550 (1977) ("that land had long been in private ownership and, hence, under the great weight of precedent from this court, subject to the general body of state property law").

3. Prior To The *Kavanaugh Cases*, Michigan Law Held That Shoreline Owners Held Title To The Water's Edge

After concluding that Michigan law controlled the disposition of the case, the *Hilt* court concluded that, prior to the *Kavanaugh* decisions, "this court, in common with public opinion and in harmony with the weight of authority, assumed, without question, that the upland proprietor **owns to the water's edge**." *Id.* at 212 [emphasis added]. In so holding, the *Hilt* court cited with approval *People* v *Warner*, 116 Mich 228; 74 NW 705, 711 (1898)[3] and *People* v *Silberwood*, 110 Mich 103; 67 NW 1087 (1896), as well as the concurring opinion in *State* v *Lake St Clair Fishing & Shooting Club*, 127 Mich 580; 87 NW 117 (1901), all of which held that private ownership extends to the water. *Hilt* at 208-209.

[3] After noting that the high and low water marks may well be synonymous because there are no tides on the Great Lakes, the *Warner* court stated that "[t]he adjoining proprietor's fee stops there, and there that of the State begins, whether the water be deep or shallow, and although it be grown up to aquatic plants, and although it be unfit for navigation." *Id.* at 239.

4. The *Hilt* Court Clearly Held That The Public Trust Terminates At The Water's Edge

The *Hilt* court acknowledged that the "public trust" doctrine (termed the "trust doctrine" by the court) had been recognized by Michigan courts as early as 1843 in *La Plaisance Bay Harbor Co* v *City of Monroe*, Walker's Ch 155 (1843). In that case, the court had explained that "the proprietor of the adjacent shore has no property whatever in the land **covered by the water of the lake**." *Hilt* at 208 (emphasis added). The court also noted the reference to the doctrine in several other cases. *Id.* The court then dealt head on with the heated and vigorous arguments, presumably made by the state Conservation Department and others by way of amicus briefs, that the trust doctrine should not end at the water's edge, but should extend upward across the dry shore. *Hilt* at 224. Despite the state's apparent strong desire for "public control of the lakeshore," the *Hilt* court clearly and unequivocally rejected this extension of the public trust doctrine:

> "With much vigor and some temperature, the loss to the State of financial and recreational benefit has been urged as a reason for sustaining the *Kavanaugh* doctrine. It is pointed out that public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the State and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The State should provide proper parks and playgrounds and camping sites to enjoy the benefits of nature. But to do this, the State has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the State, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The State must be honest." *Hilt* at 224.

The court further explained that, even under the *Kavanaugh Cases*, the state's alleged title to the meander line was merely that of trustee, holding the land "only for the preservation of the public rights of navigation, fishing, and hunting." *Id.* at 224. Thus, when it overruled the *Kavanaugh Cases* and instead held that the state's title ended at the water's edge, the *Hilt* court was referring to

the terminus of the public trust. Any doubt regarding this point disappears in the face of the following statement from the dissent:

> "My brother's opinion is far reaching, for it constitutes the Michigan shoreline of 1624 miles private property, and thus destroys for all time the trust vested in the State of Michigan for the use and benefit of its citizens." *Id.* at 231.[4]

5. In This Case, The Court Of Appeals Mistakenly Suggested That The "Public Trust" Permanently Extends Landward Of The Submerged Lands Of The Great Lakes

In its opinion in this case, the Court of Appeals reached the correct result in holding that, pursuant to *Hilt* and subsequent cases, Great Lakes' riparian property owners have the right to exclusive use and enjoyment of their land to the water's edge. Unfortunately, some portions of the Court of Appeals' opinion seem to imply that the state holds title in trust to a part of the riparian owners' exposed property landward of the water's edge, even though other portions of the opinion correctly note that the state's trust interest is limited to submerged lands.

For example, at one point, the Court of Appeals emphasized that the public trust applies only to submerged lands:

> "That the state of Michigan holds in trust the *submerged lands* beneath the Great Lakes within its borders for the free and uninterrupted navigation of the public is without doubt." *Glass* v *Goeckel*, 262 Mich App 29, 42; 683 NW2d 719 (2004), [emphasis in original] (citing *Peterman* at 194; *Nedtweg* v *Wallace*, 237 Mich 14, 16-17; 208 NW 51 (1926); *People* v *Massey*, 137 Mich App 480, 485; 358 NW2d 615 (1984)).

However, intertwined with this same discussion is the implication that the public trust extends to exposed lands lying above the water's edge:

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[4] Of course, the majority's decision did not destroy the public trust in any property, because no public trust ever extended beyond the water's edge and onto the lakeshore. The same holds true today.

> "The *Hilt* conclusion that a riparian owner has the right to the exclusive use of relicted land is entirely consistent with the title held by the State under the public trust doctrine.
>
> * * *
>
> Although the state holds title to land previously submerged, the state's title is subject to the riparian owner's exclusive use, except as it pertains to navigational issues. [internal citations omitted]. However, if and when the Great Lakes rise, the riparian owner no longer has exclusive use to that submerged land, for the state's title in public trust for navigational purposes becomes paramount." *Id.*, at pp 42-43.

The implication that the state has public trust title to exposed, dry lands is, of course, irreconcilably inconsistent with the holdings of *Hilt* and *Peterman* that Great Lakes riparian property owners themselves have title that extends to the water's edge. It is simply not possible for the state and private property owners to hold mutually exclusive titles to the same land at the same time.[5]

There are numerous cases that describe the "public trust" as attaching only to the "submerged lands" of the Great Lakes, including *Hilt*. *See*, e.g., *Illinois Central R Co* v *Illinois*, 146 US 387, 452; 13 S Ct 110; 36 L Ed 1018 (1892) ("the state holds title to the lands **under the navigable water** of Lake Michigan") [emphasis added]; *Hilt* at 202 ("State has title in fee in trust for the public to **the submerged beds** of the Great Lakes within its boundaries") [emphasis added]; and *People ex rel Director of Conservation* v *Broedell*, 365 Mich 201, 205; 112 NW2d 517 (1961) (title of the State to "submerged lands" in the Great Lakes is impressed with public trust). The inescapable fact

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[5] The Court of Appeals' confusion on this point may stem from the court's failure to differentiate between two separate legal theories that have important distinguishing characteristics: (1) the public trust doctrine, through which the state holds title to Great Lakes' *submerged* lands in trust for the people of the state so that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein, without obstruction or interference from private parties (*see Peterman* at 194; *Nedtweg* v *Wallace*, 237 Mich 14, 16-17; 208 NW 51 (1926); and *People* v *Massey*, 137 Mich App 480, 485; 358 NW2d 615 (1984)); and (2) the "navigational servitude," which allows the state, or the federal government, under proper circumstances of public necessity, to incidentally burden privately held Great Lakes riparian property if such burdens are the result of making navigational improvements on or in the waters of the Great Lakes. *Peterman* at 193-195. The navigational servitude is not implicated in this case.

is that, subsequent to *Hilt*, and setting aside the Court of Appeals' decision in this case, there has never been a Michigan case holding that the public trust applies to dry land above the water's edge.

The limitation of the public trust to lands that are actually submerged is compelled not only by the relevant case law cited above, but also by common sense, since the purpose of the trust is to protect the public's right to enjoy navigation on the waters, to carry on commerce over them, and to have the liberty of fishing therein (*see Peterman* at 194; *Nedtweg* at 16-17; and *Massey* at 485) – all activities which are performed on the surface of the water, not on dry land.[6] Indeed, conspicuously absent from the list of activities protected by the public trust is walking on the beach – the dry land activity which Plaintiff has improperly tried to shoe-horn into the public trust without a scintilla of legal support for doing so. The relevant Michigan authorities thus compel the conclusion that the public trust applies only to submerged lands when they are actually submerged.

6. Plaintiff's Arguments Are Nothing But An Attempt To Rewrite *Hilt* v *Weber*

In an attempt to escape the clear holding of *Hilt*, Plaintiff argues in her brief at pages 24-26 that the *Hilt* court meant something else in using the term "water's edge" when it referred to the extent of a riparian owner's fee title. It is Plaintiff's unsupported opinion that the *Hilt* court used this terminology when the court really meant to refer to the "high water mark."

The *Hilt* court was clearly aware of prior Michigan Supreme Court decisions using terms such as "low water mark" and "high water mark" in relation to boundaries along the Great Lakes. See the quotations from earlier cases using these terms set forth at 252 Mich pp 208-210. Therefore, in order to accept Plaintiff's arguments, one must accept the proposition that the *Hilt* court – knowingly embarking on one of the most important riparian rights decisions in Michigan's

[6] Amicus Curiae Tip of the Mitt Watershed Council concedes as much at pp 4, 37-38 of its Brief filed in support of Plaintiff herein.

jurisprudential history – sloppily and accidentally replaced the term "high water mark" with the phrase "water's edge" when it really meant the former.[7] Further, the court must have done so with full knowledge that another "water's edge" – the "low water mark" – had been repeatedly referred to in prior decisions involving similar boundary issues. Indeed, when the *Hilt* court at page 212 discussed the case of *La Porte* v *Menacon*, 220 Mich 684; 190 NW 655 (1922), it equated the term "lowest water mark" with the term "water's edge."

To continue to stay on course with Plaintiff's arguments, one must then accept the proposition that both this Court and the Court of Appeals repeated the same sloppy use of the English language in not less than six opinions covering the same subject over a course of approximately 64 years. *See Peterman* at 192 (quoting *Hilt*) ("the 'title of the riparian owner follows the **shore line**'"); *Bott* v *Comm of Natural Resources*, 415 Mich 45, 82-84; 327 NW2d 838 (1982) ("In *Hilt*, a recent holding in the *Kavanaugh Cases* that owners adjacent to the Great Lakes hold title to land running along the meander line but not to the **water's edge** was re-examined and overruled."); *Klais* v *Danowski*, 373 Mich 262, 279; 129 NW2d 414 (1964) (recognizing under *Hilt* that a riparian owner has use of the land to the **water's edge**, including any new land occurring through accretions or reliction); *Donohue* v *Russell*, 264 Mich 217, 218; 249 NW 830 (1933) (recognizing that *Hilt* "held that the riparian owner owns the land beyond the meander line to the **edge of the water**"); *Boekeloo* v *Kuschinski*, 117 Mich App 619, 626-627; 324 NW2d 104 (1982) (recognizing that *Hilt* held that "**the waters themselves** constitute the real boundary"); *Turner*

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[7] In *People v Broedell*, 365 Mich 201; 112 NW2d 517 (1961), this Court again pointed out that the various decisions issued prior to the 1930 *Hilt* decision referring to the extent to which the public trust existed along the Great Lakes shoreline had confusingly indicated that the boundary line was located at various "high water" marks or "low water" marks. The *Broedell* court then noted that the *Hilt* court found the dividing line between the state's and a riparian owner's land followed the "water's edge." 365 Mich at 205, 206. Surely, had the *Hilt* court meant the "high water mark" (or the "low water mark"), it would have used that term in light of the existing inconsistency.

Subdivision Prop Owners Assn v *Schneider*, 4 Mich App 388, 391; 144 NW2d 848 (1966) ("*Hilt* established that a riparian owner owns land between the meander line and **the water**").

Plaintiff's position that this Court and the Court of Appeals have been using the wrong terminology for 75 years is untenable, and finds no support under Michigan law. The "movable freehold" referred to by the *Hilt* court and by several subsequent courts unambiguously finds its boundary at the water's edge.[8] Plaintiff's attempt to redefine the *Hilt* court's "movable freehold" as slow and imperceptible shifting of the "usual high water mark" (*see* Pl's Brief at p 22) finds no support other than in Plaintiff's individual desire to overturn established Michigan property law. Furthermore, to the extent that Plaintiff attempts to alternatively argue that the boundary is the fixed ordinary high water mark established by Part 325 of NREPA (*see* Pl's Brief at pp 35-39), this is totally inconsistent with the *Hilt* court's concept of a "movable freehold." Does Plaintiff actually expect the Court to believe that the *Hilt* court meant to refer to a "movable freehold" that never moves?

The fallacy of Plaintiff's position is further highlighted by her own admission regarding the implicit errors in the *Kavanaugh Cases*. In that regard, Plaintiff admits that the *Kavanaugh Cases* were patently erroneous because, by allowing the state's trust interest to extend to the meander line, the *Kavanaugh* court had cut off Great Lakes riparian properties from physical contact with the waters defining them as riparian in the first instance. *See* Pl's Brief at p 23. At the same time, however, Plaintiff wants this Court to draw a new but equally divisive line in the sand –the ordinary high water mark. This new line would likewise cut off Great Lakes riparian properties from physical

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[8] In fact, a very recent unpublished decision by the Court of Appeals recognizes that a "movable freehold" bounded by the "water's edge" expands and contracts based on short-term fluctuations and climatological changes. See *Shiawassee County* v *Bambi Lake Assn*, 204 Mich App LEXIS 2556 (2004) (see Attachment 1) (noting that the water's edge "is higher after rainfall and lower during drought").

contact with the waters defining them as riparian, and would therefore suffer from the same problem as the meander line used in the *Kavanaugh Cases*.

Stated another way, Plaintiff appears to be comfortable with the concept of creating a "public trust" corridor along the beach that cuts off riparian properties from physical contact with the water which defines them as riparian, so long as the corridor is narrower than that created by the meander line, but just wide enough to accommodate Plaintiff's interest in walking the beach. This is, of course, preposterous. Plaintiff cannot have it both ways. As the *Hilt* court correctly recognized and Plaintiff is forced to admit, "[t]he basis of the riparian doctrine, and an indispensable requisite to it, is actual contact of the land with the water." *Hilt* at 218. Therefore, if the Court were to insert a "public trust" corridor – no matter how infinitesimally small – between riparian property and the waters which define it as riparian, it would making the same error that infected and led to the Court's expeditious overruling of the *Kavanaugh Cases*.

The Court of Appeals correctly held in this case that riparian property owners have exclusive control of their properties to the water's edge. Unfortunately, the Court of Appeals erred by failing to note that the public trust interest held by the state in submerged lands also ends at the water's edge where the riparian owner's title begins. This error is relatively harmless to Defendants in the limited factual context of this particular case (Plaintiff is effectively prevented from trespassing on Defendants' beachfront anyway). However, it does represent a fundamental error in the interpretation of Michigan riparian property law, which could cause great mischief by confusing settled law that has existed for at least 75 years. Needless litigation is likely to be the result. Thus, Amici Curiae urge the Court to affirm the Court of Appeals' decision on the basis that Michigan law has long held that Great Lakes riparian property owners have title to the water's edge free from the public trust imposed on submerged lands of the Great Lakes.

B. *Hilt* v *Weber* Continues To Be Controlling Law In Michigan

There is no doubt that the *Hilt* decision continues to represent the law in Michigan, as evidenced by the number of subsequent Michigan opinions that have reaffirmed its holding of riparian title to the water's edge. *Peterman, supra*; *Bott, supra*; *Klais, supra*; *Donohue, supra*; *Boekeloo, supra*; and *Turner Subdivision Prop Owners Assn, supra.* The most recent of these is the *Peterman* opinion, decided in 1994 – 64 years after *Hilt.*

As noted previously, in *Peterman*, Great Lakes riparian property owners sued the Department of Natural Resources ("DNR") for just compensation due to the destruction of their beachfront – both above and below the ordinary high water mark – caused by the DNR's negligent installation of an adjacent boat launch and jetties. In framing its analysis, the *Peterman* court first set forth the fundamental holding of *Hilt* that established riparian ownership to the water's edge: "**title of the riparian owner follows the shoreline** under what has been graphically called 'a movable freehold.'" *Peterman* at 192 (quoting Hilt at 219) [emphasis added]. The court also specifically referenced with approval the *Hilt* court's conclusion that "the riparian owner has the exclusive use of the bank and shore." *Id.* at 192 (citing *Hilt* at 226).

Based on these fundamental precepts established by *Hilt*, the *Peterman* court ultimately held that the state must compensate the riparian owner for the state's negligent destruction and the resulting "loss of the beach below the ordinary high water mark." *Id.* at 200-202. In so holding, the *Peterman* court – like the *Hilt* court 64 years earlier – recognized the potential benefits of "public control of the lakeshores." Importantly, however, the *Peterman* court, like the *Hilt* court, eschewed the notion being advocated by Plaintiff in this case, that public control of the lakeshore could be taken by the state without payment of just compensation therefor: "There is no duty, power, or

function of the State, whatever its claimed or real benefits, which will justify it in taking private property without compensation." *Id.* at 193 (citing *Hilt* at 224).

Thus, the argument that the public trust doctrine extends beyond the actual water's edge was rejected by this Court in 1930, and that rejection was reaffirmed by this Court in 1994. Both *Hilt* and *Peterman* remain the law in Michigan today.

C. The Great Lakes Submerged Lands Act Does Not Alter The Rule Of *Hilt* v *Weber* Establishing Riparian Ownership Extending To The Water's Edge

Plaintiff and Amicus Curiae Tip of the Mitt Watershed Council contend that Section 2 of the Great Lakes Submerged Lands Act, now codified at MCL 324.32502 ("GLSLA"), was intended by the Legislature to create a permanently fixed boundary between public and private ownership along the Great Lakes shoreline. (Pl's Brief at pp 35-39; Tip of the Mitt Brief at pp 12-20) However, as will be shown below, this contention cannot withstand scrutiny under Michigan's well-recognized principles of statutory construction.

The clear and unambiguous terms of the GLSLA leave no room to construe that statute as creating a permanently fixed boundary between public and private ownership along the Great Lakes shoreline or as altering the rule of *Hilt* v *Weber*. As this Court has noted:

> "A fundamental principle of statutory construction is that 'a clear and unambiguous statute leaves no room for judicial construction or interpretation.' *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993). The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. *Sun Valley Foods Co v Ward*, 460 Mich 230; 596 NW2d 199 (1999). When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 621 (1995)." *Kenneth Henes Special Projects, Mktg & Consulting Corp* v *Continental Biomass Indus (In re Certified Question)*, 468 Mich 109, 113; 659 NW2d 397 (2003).

Even if the terms of the GLSLA were not clear and unambiguous in this regard, construing the GLSLA as contended by Plaintiff would be contrary to the rules of statutory construction applied by this Court where the disputed interpretation would impact the established common law. In *Nation* v *W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997), the Court set the following rules for determining legislative intent:

> "However, the Legislature is deemed to act with an understanding of common law in existence before the legislation was enacted. *Nummer v Treasury Dep't*, 448 Mich 534, 544; 533 NW2d 250 (1995); *Garwols v Bankers Trust Co*, 251 Mich 420, 424-425; 232 NW 239 (1930). Moreover, 'statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law.' *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 508; 309 NW2d 163 (1981). In other words, '[w]here there is doubt regarding the meaning of such a statute, it is to be 'given the effect which makes the least rather than the most change in the common law.'' *Energetics, Ltd v Whitmill*, 422 Mich 38, 51; 497 NW2d 497 (1993)."

1. The Language Used By The Legislature In The GLSLA Does Not Purport To Alter The Rule Of *Hilt* v *Weber*

When the GLSLA was enacted in 1955,[9] Section 2 of the Act contained the following sentence:

> "The lands covered and affected by this act are all of the unpatented submerged lake bottom lands and unpatented made lands in the great lakes, including the bays and harbors thereof, belonging to the state of Michigan or held in trust by it which have heretofore been artificially filled in and developed with valuable improvements." See 1955 PA 247 (see Attachment 2).
>
> Section 2 of the Act further stated that:
>
> "The word 'land' or 'lands' whenever used in this act shall refer to the aforesaid unpatented submerged lake bottom lands and unpatented made lands in the great lakes and the bays and harbors thereof." *Id.*

[9] In reality, the Great Lakes Submerged Lands Act of 1955 did not set forth entirely new concepts. 1913 PA 326 used fairly similar language in designating lands which were deemed to be under the authority of the State Board of Control.

Thus, it is readily apparent that the Legislature carefully limited the reach of the GLSLA by including within Section 2 language that specifically defined a very limited category of lands to which the Act was made applicable; namely, "unpatented submerged lake bottom lands and unpatented made lands" of the Great Lakes then "belonging to" or "held in trust by" the State of Michigan and that had previously "been artificially filled in and developed with valuable improvements."

The title of 1955 PA 247 is fully consistent with this interpretation. There, the language chosen by the Legislature indicates that the Act's only purpose was to "authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented submerged lake bottom lands and unpatented made lands in the great lakes . . . belonging to the State of Michigan or held in trust by it." There is, of course, no mention of any purpose to legislatively overrule the decision in *Hilt* v *Weber* or to abrogate the concept of a private riparian owner's "movable freehold" by establishing a fixed boundary for such property landward of the water's edge and thereby effecting a taking without payment of just compensation. In fact, given that (i) the only legislatively-expressed purpose of the GLSLA was to authorize a grant, conveyance or lease of lands, and (ii) a party can only grant, convey or lease lands in which that party has an interest, it follows that the only lands subject to the GLSLA are those "belonging to the State of Michigan or held in trust by it." And, as noted earlier, this is precisely what Section 2 of the GLSLA has always provided.

There was an amendment to Section 2 of the GLSLA adopted in 1958. The amendment eliminated the language restricting the GLSLA's application to "lands" that had previously "been artificially filled in and developed with valuable improvements." See 1958 PA 94, Attachment 3. By so doing, the Legislature allowed for the Act to apply to all of the "unpatented submerged lake

bottom lands and unpatented made lands" of the Great Lakes then "belonging to" or "held in trust by" the State of Michigan, not just those that had been artificially filled in or improved. There is, however, absolutely no indication of any intent to expand the Act's application to privately owned lands; i.e. lands not owned or held in trust by the State of Michigan.

2. The Legislative History Of The GLSLA And Other Principles Of Statutory Construction Confirm That The GLSLA Does Not Alter The Rule Of *Hilt* v *Weber*

The reason why the GLSLA was adopted is explained in a 1955 article by George Haller, Professor of Law at the Detroit College of Law.[10] The author indicates that, prior to 1955, there had been widespread filling operations in Lake Huron and Lake Michigan whereby riparian owners had extended their property by filling in areas covered by shallow waters. The State of Michigan started proceedings against certain of these riparian owners in the St. Clair Shores area to enjoin this practice. Professor Haller indicates that legislation was then introduced to allow for resolution of the issues raised in the injunction proceedings by permitting the defendants occupying filled in bottomlands to purchase the State of Michigan's interest therein. The legislation being referred to by Professor Haller in this article was, quite obviously, 1955 PA 247. The article therefore confirms that the limited purpose for which the GLSLA was originally enacted had nothing to do with overturning the ruling in *Hilt* v *Weber*.

As discussed earlier, the Legislature amended Section 2 of the GLSLA in 1958 by eliminating the language that restricted the act's application to Great Lakes bottomlands belonging to or held in trust by the state of Michigan "which have heretofore have been artificially filled in and developed with valuable improvements." See Attachment 3. Professor Haller notes that this amendment was intended only to permit the Department of Conservation to sell any part of the

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[10] Haller, *Michigan Purloined Shorelines*, 34 Mich St B J 36 (May 1955) (see Attachment 4).

public trust domain in submerged lands of the Great Lakes, not just the filled in or occupied portion thereof. Haller, *Submerged Lands Revisited*, 40 Mich St B J 13, 14-15 (Dec 1961) (see Attachment 5). As such, the amendment affords no basis to conclude that the GLSLA was intended to fix a new boundary line between public and private ownership along the Great Lakes.

In fact, the Department of Conservation (which was the agency charged with administering the GLSLA at the time of its enactment) recognized that the *Hilt* court had made clear 25 years earlier that the applicable boundary line was the water's edge, and the Department of Conservation continued to follow *Hilt* on this point following the passage of that Act. This was affirmed by testimony given in the case of *People ex rel Director of Conservation* v *Broedell*, 365 Mich 201, 206; 112 NW2d 517 (1961). There, the Supreme Court observed the agency's position to be as follows:

> "Plaintiff says that in administering the submerged land acts, above mentioned, it follows the 'philosophy' which it says is found in *Hilt* v *Weber*, 252 Mich 198 (71 ALR 1238), of 'a movable freehold,' that is to say, that the dividing line between the state's and the riparian owners' land follows the water's edge, or shoreline at whatever level it may happen to be from time to time."

The submerged land "acts" referred to by the Supreme Court included the GLSLA. *Id.* at 204. Thus, it is evident that the agency administering the GLSLA looked to the common law of *Hilt*, and not the GLSLA (or other statutes), to determine the location of the shoreland boundary.

Acknowledging as one must that the original purpose of the GLSLA was to authorize conveyances of the state's interest in submerged lands (initially submerged lands which had been filled in and developed, but after the 1958 amendment the state's interest in any submerged lands along the Great Lakes that it owned or held in trust), the fact that the Department of Conservation promulgated administrative rules which referenced the term "ordinary high water line" cannot – as

Tip of the Mitt contends at pages 31-34 of its brief – be determinative of the location of the boundary line between private and public interests along the Great Lakes.[11]

Instead, it is overwhelmingly likely that the agency had completely different reasons for incorporating the ordinary high water mark concept into its administrative rules for administering the GLSLA. For example, under the *Hilt* "movable freehold" principle, the state's public trust interest in shorelands could potentially extend to the ordinary high water mark, *but only if the water's edge ever rose to that point*. A consistent definition specifically locating the ordinary high water mark was needed by the agency to allow for the preparation of proper legal descriptions and surveys for inclusion in conveyances relinquishing all of the state's present and *potential future* interests in shorelands to be conveyed pursuant to the Act. In other words, while the state's interest at the time of a conveyance under the GLSLA extends landward only to the water's edge under *Hilt*, if the description in a deed to property given pursuant to the GLSLA covered all of the property lying lakeward of the ordinary high water mark, the state would, as intended by the Act, be relinquishing any interest it could claim should the water's edge move landward after the date of the conveyance.

To the extent there is any ambiguity in this regard, it must be remembered that the provisions of Section 2 of the GLSLA consistently refer only to coverage of lands belonging to the state or held in trust by it. "When interpreting a court rule or statute, we must be mindful of 'the surrounding body of law into which the provision must be integrated. . . .' *Green v Bock Laundry Machine Co*, 490 US 504, 528; 109 S Ct 1981; 104 L Ed 2d 557 (1989) (Scalia, J. concurring)." *Haliw* v *City of Sterling Heights*, ___ Mich ___; ___ NW2d ___ (2005) (Case No. 125022, decision filed

[11] Certainly, the agency was not given the authority to make such a rule by the GLSLA. That statute merely authorized the state to grant, convey or lease such submerged lands as it owned or were within the public trust as determined by the common law expressed in *Hilt*. The Department of Conservation was bound by that common law, as the agency itself acknowledged in testimony referred to by the Michigan Supreme Court in *Broedell, supra.*

January 25, 2005). Such a rule of interpretation confirms that inclusion of the concept of the ordinary high water mark into the GLSLA was not intended to create a fixed boundary between public and private interests along Great Lakes shorelines - - particularly where the body of law into which the concept was inserted simply authorizes the conveyance of interests owned by the state and sets forth a permitting scheme for certain activities.

In sum, a careful analysis of the GLSLA, considered in the context of the Supreme Court's decision in *Hilt* and its progeny, can lead to only one reasonable conclusion: the GLSLA did not, nor was it ever intended to fix a permanent, immutable boundary between public and private ownership along the Great Lakes.

II. RECOGNIZING ANY PUBLIC TRUST INTEREST IN BEACH AREAS LANDWARD OF THE WATER'S EDGE WOULD CONSTITUTE A JUDICIAL USURPATION OF LEGISLATIVE AUTHORITY

Given the longstanding case law cited above, any effort to expand the public trust doctrine along the Great Lakes shoreline beyond its application to land actually submerged by water would involve this Court in a legislative function constitutionally allocated to the Legislature. This Court should not intrude into the legislative arena by now recognizing any public trust interest in the areas landward of the water's edge of any of the Great Lakes.[12]

A. Under The Michigan Constitution Of 1963, The Judiciary Is Prohibited From Exercising Legislative Power

The Michigan Constitution provides that: "The powers of government are divided into three branches: legislative, executive, and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this

[12] The arguments made in Sections II and Section III of this brief are also applicable to Plaintiff's argument at pages 47-48 of her brief that through either the doctrine of prescription or custom the public should be allowed to use the beach areas.

constitution." Mich Const 1963, art 3, § 2. This formal separation and express prohibition serves "to disperse governmental power and thereby to limit its exercise." *National Wildlife Federation* v *Cleveland Cliffs Iron Co*, 471 Mich 608, 613; 684 NW2d 800 (2004).

There are basic distinctions between the judicial power and legislative power. The judicial power deals with pre-existing wrongs and remedies, while the legislative power deals with broad public interest and is forward looking. This Court in *Cleveland Cliffs Iron Co* adopted Justice Cooley's definitions of judicial power and legislative power: "It is the province of judicial power . . . to decide private disputes between or concerning persons; but of legislative power to regulate public concerns, and to make law for the benefit and welfare of the state." *Cleveland Cliffs Iron Co*, 471 Mich at 614 (citing Cooley, A Treatise on the Constitutional Limitations 187 (Little, Brown & Co, 8th ed 1927)). Justice Cooley wrote that what "distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a pre-determination of what the law shall be for the regulation of all future cases falling under its provisions." Cooley, A Treatise on the Constitutional Limitations at 183; see also *Cleveland Cliffs Iron Co*, 471 Mich at 615 (noting that the exercise of judicial power places "the emphasis upon proscriptive as opposed to prescriptive decision making"). The judicial power is thus limited to remedying pre-existing wrongs.

The legislative power is forward-looking in nature. "The legislative power is the power to determine the interests of the public, to formulate legislative policy, and to create, alter, and repeal laws." See *Taxpayers of Mich Against Casinos* v *State*, 471 Mich 306, 356; 685 NW2d 221 (2004) (Weaver, J., concurring in part and dissenting in part). See also *People* v *Maffett*, 464 Mich 878, 896; 633 NW2d 339 (2001) ("To declare what the law shall be is legislative; to declare what it is or has been is judicial . . . The Legislature prescribes rules for the future. The judiciary ascertains

existing rights.") (Corrigan, C.J., dissenting) (quoting *In re Manufacturer's Freight Forwarding Co*, 294 Mich 57, 63; 292 NW 678 (1940)) (emphasis added).

B. Expansion Of The Public Trust Doctrine Would Be An Impermissible Exercise Of Legislative Power By The Judiciary

Arguments to overrule or re-write the 75-year old rules of property laid down in *Hilt* so as to cause a landward expansion of the public trust doctrine plainly ask this Court to "determine the interests of the public, to formulate legislative policy, and to create, alter, and repeal" the existing, settled law governing the public trust doctrine – in short, to legislate. *Taxpayers of Mich Against Casinos*, 471 Mich at 356.

In *Bott* v *Commission of Natural Resources*, *supra*, the state agency defendant strenuously argued that this Court should overrule or re-interpret past court decisions regarding the extent of the public trust interest so as to grant the public access to what were understood to be private waters. The *Bott* court correctly recognized that such arguments invited the court to act in the legislative arena, something directly contrary to the principles behind the separation of powers doctrine. The Court points out in *Bott* that it is for the Legislature, "if it is thought to be sound public policy," to enlarge public rights, not the Court. 415 Mich at 62-64. The *Bott* court also points out why the Legislature, a majoritarian body with the necessary competence and resources, was the body best able to resolve the difficult and complex policy issues which would necessarily arise in determining where to draw the line between public water needs and private property rights. 415 Mich at 84-86.

Bott left to the Legislature the role of expanding or contracting the scope of the public trust in response to tangible changes in the public interest. But even if the principles of *stare decisis* requiring adherence to *Bott* (and also *Hilt*) were ignored, the fundamental separation of powers principle cited in *Bott* – that the competent majoritarian body constitutionally authorized to prescribe

rules of environmental conduct must conduct the delicate balancing between public access to natural resources and private property rights – would still control here.

C. While The Role Of Expanding The Scope Of The Public Trust Is Within The Exclusive Authority Of The Legislature, This Authority Is Subject To Constitutional Limitations Well Developed In This Court's Prior Decisions

While the decision of whether to expand the public trust interest to beach areas landward of the water's edge is constitutionally allocated to the Legislature, this authority is, as this Court has recognized and explained in its prior decisions, subject to and limited by other constitutional provisions. Regardless of whether accomplished through legislative or judicial means, expansion of the public trust interest to beach areas landward of the water's edge would require that just compensation be paid to the riparian owners along the Great Lakes shorelines.

Negation of the riparian property owner's right to exclude the public from dry land and expansion of the public trust beyond the water's edge destroys a fundamental element of property and will result in an unconstitutional taking of property. As noted in *Bott*, "Compensation has been awarded where there has been a significant reduction in the use and enjoyment of property stemming from governmental action. The recreational-boating test would deny riparian and littoral owners the right to exclude others, a right inherent in the concept of private property." 415 Mich at 81. The same effect upon a right inherent in the concept of private property would occur by any departure from the principles set forth in *Hilt* and expanding the public's rights and interest in exposed land beyond the water's edge. In *Bott*, in footnote 44, the court quotes from an early Michigan Supreme Court decision which emphasizes the value of the right to exclude:

> "'And among the incidents of property in land, *or anything else*, is not the right to enjoy its beneficial use, *and so far to control it as to exclude others from that use*, the most beneficial, the one most real and practicable idea of property, of which it is a much greater wrong to deprive a man, than the mere abstract idea of property without incidents? The use, or the right to control it with reference to its use, constitutes, in

> fact, all that is beneficial in ownership, except the right to dispose of it; and this latter right or incident would be rendered barren and worthless, stripped of the right to use.' (Emphasis supplied.) *Grand Rapids Booming Co v Jarvis*, 30 Mich 308, 320-321 (1874)." *Bott*, 415 Mich at 81-82, n44.

In *Tolksdorf* v *Griffith*, 464 Mich 1, 8; 626 NW2d 163 (2001), this Court struck down a statute providing "a permanent and continuous right to pass to and fro' over another's property." The statute constituted a taking because it authorized a "'permanent physical occupation' of private property by means of government action." *Id.* at 8 (citing *Nollan* v *California Coastal Comm'n*, 483 US 825, 832; 107 S Ct 3141; 97 L Ed 2d 677 (1987)).

In *Purdie* v *Attorney General*, 143 NH 661; 732 A2d 442, 447 (NH, 1999), the New Hampshire Supreme Court held that an attempted legislative extension of public trust rights landward from the boundary set by New Hampshire common law was "unconstitutional" because it constitutes a taking of private property without just compensation."[13] In *Bell* v *Town of Wells*, 557 A2d 168, 180 (Me, 1989), the Maine Supreme Court held that a state statute purporting to expand permissible public trust uses of inter-tidal lands so as to include general recreational uses, in addition to fishing, fowling and navigational uses permitted under pre-existing common law, was an unconstitutional taking of private property without just compensation.

Purdie and *Bell* also refute any argument that there can only be one location a state can recognize as the boundary between public and private interests along shorelines. Both cases involved disputes regarding the public/private boundary along the Atlantic Ocean shoreline. As

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[13] The obligation to pay compensation for allowing public access to the dry beach areas would similarly exist if, as contended by Amici National Wildlife Federation and Michigan United Conversation Clubs, the Legislature, in passing and amending the Great Lakes Submerged Lands Act ("GLSLA"), MCL 324.32501, *et seq.*, replaced *Hilt*'s movable freehold boundary with the immutable ordinary high water mark defined for other purposes in the GLSLA. Brief of Amici Curiae National Wildlife Federation and Michigan United Conservation Clubs in Support of Plaintiff-Appellant at 5. This consequence of such an application of the GLSLA supports affirmance of the Court of Appeals' reading of the GLSLA.

Purdie points out, the common law boundary line recognized in New Hampshire differed geographically from the common law boundary line recognized in Massachusetts. 732 A2d at 446-447. Thus, the *Hilt* court's recognition that along the Michigan Great Lakes shoreline the state's common law drew the boundary line for title and public trust purposes at the water's edge does not, as contended by Plaintiff at pages 20 and 46 of her brief, result in any abdication by the state of an obligation to protect the interests of the public in trust lands. Nor do Plaintiff's claims, at pages 40 to 46 of her brief, that other Great Lakes states recognize a different location for the boundary and/or different extent of uses allowed along Great Lakes shorelines, cast any doubt on the validity of the boundary as set by the Michigan common law and affirmed in the *Hilt* decision.

Thus, regardless of whether the location of the boundary between public and private interests along Michigan's Great Lakes shorelines differs from that of other Great Lakes states, or from states along ocean coasts, the common law rule as affirmed in *Hilt* is a valid rule of property. Any departure from the rule of property set forth in *Hilt*, and particularly one that would allow the public to pass "to and fro" over the dry beach area owned by the riparian land owner, would result in a taking for which compensation would be due.

III. PUBLIC POLICY CONSIDERATIONS WEIGH AGAINST ALLOWING PUBLIC ACCESS TO PRIVATELY OWNED BEACH AREAS ALONG THE GREAT LAKES

The system of separated powers and settled "takings" law provide strong constitutional bases for rejecting Plaintiff's request to expand public access to beach areas along the Great Lakes. Of equal or greater weight are public policy considerations, which, while best dealt with by the Legislature, demonstrate the problems inherent in now allowing such public access.

A. As A Rule Of Property Law, *Hilt* Should Not Be Overturned

Even if modern courts could find fault with the *Hilt* decision, the decision should nevertheless stand. This Court has held that "*stare decisis* is to be strictly observed where past decisions establish 'rules of property' that induce reliance." *Bott* v *Commission of Natural Resources*, 415 Mich 45, 77; 327 NW2d 838 (1982) (citing *Lewis* v *Sheldon*, 103 Mich 102; 61 NW 269 (1894) and *Hilt* v *Weber*, *supra*). Urged in 1982 to extend public rights of use to a creek by modifying the definition of navigability, the *Bott* court refused:[14]

> "The rules of property law which it is proposed to change have been fully established for over 60 years, and the underlying concepts for over 125 years. Riparian and littoral land has been purchased in reliance on these rules of law, and expenditures have been made to improve such land in the expectation, based on decisions of this Court, that the public has no right to use waters not accessible by ship or wide or deep enough for log flotation, and that, even if there is navigable access to a small inland dead end lake, the public may not enter over the objection of the owner of the surrounding land, and that the only recreational use recognized by this Court as an incident of the navigational servitude is fishing. The Legislature can, if it is thought to be sound public policy to enlarge public access to and the use of inland waters, pass laws providing for the enlargement of the rights of the public in those parts of the state where the Legislature finds that there is a shortage of public access to inland rivers and lakes and for the compensation of landowners affected by the enlarged servitude." (Emphasis added)

The Court further stated:

> "The justification for this rule is not to be found in rigid fidelity to precedent, but conscience. The judiciary must accept responsibility for its actions. Judicial 'rules of property' create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital . . . . It cannot be denied that some landowners have invested their savings or wealth in reliance on a long-established definition of navigability. It also cannot be denied that the heretofore private character of the waters adjacent to their property significantly adds to its market value. Vacationers are not manufacturers who can pass on their losses to a large class of consumers. Techniques to safeguard past reliance on prior law such as prospective overruling are unavailable where property rights are extinguished. Prevention of this hardship could be avoided through compensation, but this Court

[14] Plaintiff plainly misreads the holding in *Bott* as actually expanding the extent of the public trust doctrine. See Plf's Brief at p 18, n 10, and pp 37-38.

has no thought of providing compensation to riparian or littoral owners for the enlarged servitude and the resulting reduction in amenities and economic loss." *Id.* at 77.

Since the *Hilt* decision in 1930, riparian owners have relied on the rule of property law established by it, and under the foregoing authority, the rule should stand.

B. Allowing Public Access To And Use Of The Beach Areas Will Diminish The Enjoyment And Value Of The Riparian Lands

In *Bott, supra*, this Court recognized that merely by allowing public use of previously non-navigable waters, the enjoyment of the surrounding properties would be diminished. This Court noted that many of those who owned such property were vacationers who acquired the property for a peaceful retreat and the opening of the adjacent waters to the public could render the property unfit as a refuge or as a retreat. 415 Mich at 78-79. The impact predicted in the *Bott* opinion would be even greater if this Court were to open up beaches landward of the water's edge for public use as the Plaintiff demands in this case.

Opening up the beaches to public use would adversely affect not just the intangible values flowing from the peaceful refuge or retreat offered by private beach areas along riparian lands, but also the financial investment made by owners of the riparian land. These owners and their mortgage lenders – many of whom are members of one or more of the Amici Curiae submitting this brief – have invested substantial monies in reliance on the rule laid down in *Hilt*. In *Bott*, it was noted, "It also cannot be denied that the heretofore private character of the waters adjacent to their property significantly adds to its market value." 415 Mich at 79. The same is true of the private character of the beach lands adjacent to riparian property along the Great Lakes shorelines. Expanding the public use of this area will cause economic loss to the owners of the riparian lands.

C. Departure From The Principle Set Forth In *Hilt* v *Weber* Will Result In A "Taking" Of Private Property Rights

As is discussed in Section II(C) above, disregarding the rule of property set forth in *Hilt* and allowing public access to dry beach areas above the water's edge denies the riparian property owner control so as to exclude others from use of that area. This would, under this Court's precedents in *Bott* and *Tolksdorf, supra*, constitute a taking for which compensation would be due. Compensation due would easily be in the billions of dollars.

D. To Deviate From Or Weaken The *Hilt* Decision Would Repeat The Mistake Of The *Kavanaugh Cases*

The imposition of public rights landward of the water's edge is precisely what was attempted by the *Kavanaugh Cases*. That this was the wrong thing to do is evident from the fact that *Hilt* overruled the *Kavanaugh Cases* only a few years later. This was discussed at length in the following passage from the *Bott* opinion:

> "In *Hilt*, a recent holding in the *Kavanaugh Cases* that owners adjacent to the Great Lakes hold title to land running along the meander line but not to the waters' edge was re-examined and overruled. The *Hilt* opinion demonstrated at some length that the *Kavanaugh Cases*, decided just two years and seven years earlier, had misanalyzed prior precedent. Especially pertinent is the Court's response to the policy arguments made by those who favored retention of the disputed land for the public:
>
> > 'The doctrine of *stare decisis* has been invoked. The point has much force. Titles should be secure and property rights stable. Because a judicial decision may apply to past as well as to future titles and conveyances, a change in a rule of property is to be avoided where fairly possible. But where it clearly appears that a decision, especially a recent one, was wrong and continuing injustice results from it, the duty of the court to correct the error is plain. The *Kavanaugh Cases* were decided in the recent years in 1923 and 1928, respectively. They enumerated principles at variance with settled authority in this State and elsewhere, under which real estate transactions long had been conducted and given legal effect by courts and citizens, and themselves, disregarded the doctrine of *stare decisis* by overruling the *Warner Case [People v Warner*, 116 Mich 228; 74 NW 705], decided in 1898. The rules they stated are not as old as the

> rules they abrogated. *When to that are added the considerations that they operated to take the title of private persons to land and transfer it to the State, without just compensation, and the rules here announced do no more than return to the private owners the land which is theirs, the doctrine of stare decisis must give way to the duty to no longer perpetuate error and injustice.' Hilt*, p 223. (Emphasis supplied.)" *Bott*, 415 Mich at 82-83.

This Court should carefully heed its prior admonition: "This Court's experience following the *Kavanaugh Cases* suggests that we should not casually enlarge the rights of the public at the expense of property owners who have relied on prior decisions of this Court. The *Kavanaugh Cases* were overruled because, among other things, they worked severe injustice and constituted a judicial 'taking' without compensation." 415 Mich at 84.

E. Maintaining The Boundary Between Riparian Title And The State's Public Trust Interest At The Water's Edge Will Minimize The Potential For Litigation Between Riparian Owners And Those Seeking To Use The Dry Beach Areas

Affirming the rule enunciated in *Hilt* and its progeny, to the effect that the boundary between public and private interests along the Great Lakes is the water's edge, will minimize the chances of fomenting needless litigation. The water's edge as it exists is an easily identifiable and clear line which anyone, whether a child or a trained scientist, can readily perceive. Determining its location does not require the skills and expertise of a surveyor as would determining the location of the ordinary high water mark if the elevations set forth in MCL 324.32502 were deemed the boundary. Nor does locating the water's edge require the skills and expertise needed to analyze land forms along the shore to locate the physical ordinary high water mark. One simply looks to see where the water is and one then knows exactly where public and private rights exist. Disputes are unlikely to arise under such circumstances.

Allowing public access to and use of the area landward of the water's edge would inevitably create conflicts and thus litigation over the appropriate scope and extent of the use allowed of such

area by the public. No guidance is provided by the public trust doctrine as to what possible uses could be made by the public of dry land beyond the water's edge, because the doctrine was never intended to apply to dry land. Instead, the public trust doctrine is simply an interest the state holds in submerged lands so that the people of the state may enjoy the navigation of the waters, carry on commerce over them and have the liberty of fishing therein.

Litigants and courts in Michigan have seen the result of situations where the public right to use lands bordering water bodies existed but was not delineated or defined. Prime examples are the so-called "road end" cases where courts have been forced to repeatedly consider the issue of public access to water and usage of road ends (roads that terminate at the water's edge). See, for example, the substantial amount of litigation relating to road end issues for just one lake, Higgins Lake. *Higgins Lake Property Owners Assn* v *Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003); *Jacobs* v *Lyon Twp*, 181 Mich App 386; 448 NW2d 861 (1989) (vacated 434 Mich 922; 455 NW2d 715 (1990); *Jacobs* v *Lyon Twp*, 199 Mich App 667; 502 NW2d 382 (1993); see also *Higgins Lake Property Owners Assn* v *Gerrish Twp*, unpublished opinion per curiam of the Court of Appeals, decided October 30, 2003 (Docket No. 235418), 2003 Mich App LEXIS 2790.

Expansion of the right of the public to use areas along Great Lakes shorelines landward of the water's edge will likely lead to the same sort of recurring litigation. Maintaining the demarcation between public and private interests at the water's edge allows the public to engage in those activities which are consistent with the public trust interest held by the state in submerged lands while at the same time allowing the riparian property owner to fully exercise the rights inherent in the ownership of property along the Great Lakes shoreline.

F. The Boundary Line Drawn In The Sand By This Court In *Hilt* Must Remain At The Water's Edge

Given the public policy considerations discussed above, it is evident that determining, at this point in time, that any public rights exist landward of the water's edge along the Great Lakes would amount to a change in a longstanding rule of property, would have such an impact on the valuable waterfront properties so as to constitute a taking requiring that just compensation be paid and will only increase the amount of litigation between riparian owners and those seeking to use dry beach areas. Imposition of a servitude or public interest of any kind in the dry beach areas landward of the water's edge should not be undertaken in the context of an individual case, but rather should be left to the Legislature, subject to constitutional limitations. That body can use its greater resources to balance the competing policy considerations in an open forum and readily be held accountable for its decisions.

IV. GREAT LAKES RIPARIAN OWNERS, INCLUDING DEFENDANTS-APPELLEES, ARE NOT BARRED FROM ASSERTING TITLE TO THEIR PROPERTY BY THE RELEVANT STATUTE OF LIMITATIONS OR THE DOCTRINE OF LACHES

Amicus Curiae Tip of the Mitt Watershed Council argues, at pages 34-37 of its brief, that the relevant statute of limitations and the doctrine of laches should be applied to bar Great Lakes riparian property owners from asserting their title to lands between the water's edge and the ordinary high water mark as defined in the GLSLA, as well as any claim for a "taking" of such lands resulting from a construction of the GLSLA that would vest title to the same in the State of Michigan. In fact, neither the statute of limitations nor the doctrine of laches in any way bars these claims.

A. The Statute Of Limitations

In the present action, Amicus Curiae Tip of the Mitt has argued that the Legislature's adoption of the GLSLA operated to vest title in the State to lands lying below a new, legislatively-

defined "ordinary high water mark." But title to those lands had already been declared to be vested in riparian owners under *Hilt* v *Weber*, *supra*, as discussed earlier in Part I of this Brief. Under the Fifth Amendment to the U.S. Constitution, if the state is to take outright title to private lands or impress it with a public trust, it must obtain such rights either through voluntary conveyance or by exercising its powers of eminent domain through condemnation proceedings commenced under MCL 213.51, *et seq*.

In this context, where it is being contended that the GLSLA worked an actual transfer of ownership of lands to the state, any relevant statute of limitations would not start to run until there had been an actual conveyance of title without payment of just compensation (*Hart* v *Detroit*, 416 Mich 488, 504; 331 NW2d 438 (1982)), or until such time as the state had taken such possession and control of the disputed lands as to support a claim for adverse possession (*Difronzo* v *Village of Port Sanilac*, 166 Mich App 148; 419 NW2d 756 (1988)). *See* also, *United States* v *Dickinson*, 331 US 745, 748; 67 S Ct 1382; 91 L Ed 1789 (1947) ("Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement [i.e., by actual conveyance] or in course of time [i.e., by adverse possession]."). Neither of these events has occurred with respect to the lands below the ordinary high water mark; therefore, the statute of limitations has not yet begun to run as to any inverse condemnation claims that might subsequently ripen for review.

Moreover, even assuming the mere passage of the GLSLA in 1955[15] could somehow form the basis of an inverse condemnation claim, the period of limitation would not start to run until the consequences of the Act had thereafter stabilized. *Hart, supra* at 504.

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[15] See Part I(C) of this Brief, *supra*, establishing that the Legislature's only reason for enacting the GLSLA was to authorize the state to convey certain state-owned Great Lakes bottomlands which had been filled in, and that none of the subsequent amendments to the GLSLA

In *Hart*, the Michigan Supreme Court adopted the analytical approach set forth by the U.S. Supreme Court in *United States* v *Dickinson*, 331 US 745, with respect to determining when the statute of limitations starts to run in inverse condemnation cases. *Dickinson* involved a situation where Congress, in 1935, authorized the construction of a dam on the Kanawha River in West Virginia that would raise the water level on the upstream portion of the river and thus "take" upstream private property by way of inundating it with water and imposing a navigational servitude thereon. Despite the clear consequences of building the dam, the federal government did not commence condemnation proceedings as to the upstream properties. When upstream landowners brought takings claims about eight years later, the government argued that those claims were barred by the applicable six-year statute of limitations, which the government argued began to run not later than the time at which the dam become fully operational.

The U.S. Supreme Court rejected the government's formulation of the relevant limitations period. The Court explained that, when the full scope of the consequences of governmental action is uncertain, the statute of limitations for an inverse condemnation claim does not start to run until conditions have stabilized. *Dickinson* at 331 US 749.

Adopting this same approach in *Hart*, the Michigan Supreme Court held that the statute of limitations for a class action inverse condemnation action did not start to run when the City of Detroit first announced its intention to start condemnation proceedings covering an entire neighborhood, but rather, started to run more than a decade later – when the full scope of the city's actions and the consequences thereof had stabilized and become fully known. *Hart, supra* at 504. *See* also, *Silverstein* v *Detroit*, 335 F Supp 1306 (ED Mich, 1971) (holding that, even though

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expanded the act's coverage so as to include private lands not otherwise owned by the state as determined under *Hilt* v *Weber*.

"taking" first started in 1957 when the plaintiffs' lands were approved for condemnation, the plaintiffs' cause of action for inverse condemnation did not start to accrue until 1963, when the wrongs committed by the city had stabilized).

The same reasoning can be applied here to the purported consequences of the GLSLA, insofar as the contention that it affects regarding riparian titles is concerned. When the GLSLA was first adopted in 1955, it did not, by its plain terms, purport to grant the state ownership of privately held riparian lands below the "ordinary high water mark." Certainly the state itself did not take that position. Instead, the Department of Conservation continued to accept that the "movable freehold" established in *Hilt* v *Weber* vested title to lands above the water's edge in the riparian owner. See pp 19-20 of this Brief. In *Peterman, supra* at 446 Mich 192, the Michigan Supreme Court re-affirmed that the "title of the riparian owner follows the shore line under what has been graphically called a 'moveable freehold.'" Clearly, given the contrary contention now being advanced by Plaintiff and her amici, we are not at a point in time when the consequences of the GLSLA have stabilized, and so the limitations period for any inverse condemnation claims brought by reason thereof cannot even be said to have begun.

B. The Doctrine Of Laches

Laches is the equitable counterpart to the statute of limitations. It is premised on "'the passage of time combined with a change in condition which would make it inequitable to enforce a claim.'" *Lothian* v *Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982) (quoting *Tray* v *Whitney*, 35 Mich App 529, 536; 192 NW2d 628 (1971)); *see* also, *Public Health Dept* v *Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996).

Unlike statutes of limitations, more than mere passage of time dictates application of laches - the courts must focus on the prejudice, if any, the delay caused in determining whether laches should

be applied. *Lothian, supra*, at 168. Where "'the delay of one [party] has not put the other [party] in a worse condition, the defense of laches cannot be recognized.'" *Id.* (quoting *Walker* v *Schultz*, 175 Mich 280, 293; 141 NW 543 (1913)). Thus, while statutes of limitations focus on the fact of delay, laches focuses on the effect of delay. *Id.* (quoting *Sloan* v *Silberstein*, 2 Mich App 660, 676; 141 NW2d 332 (1966)); *Torakis* v *Torakis*, 194 Mich App 201, 205; 486 NW2d 107 (1992); *see*, e.g., *Public Health Dept, supra* (even if delay in bringing suit was unreasonably long, laches did not apply because the showing of prejudice was inadequate).

The doctrine of laches is founded upon long inaction to assert a claim in court, attended by such intermediate change of conditions as renders it inequitable to enforce that legal claim. *Manheim* v *Urbani*, 318 Mich 552, 555; 28 NW2d 907 (1947). Its purpose is to allow the denial of relief to a dilatory plaintiff where intervening circumstances would render enforcement of the plaintiff's claim inequitable. *Lewis* v *Poel*, 376 Mich 167, 169; 136 NW2d 7 (1965).

Because laches is applied so as to bar a plaintiff's belated assertion of a claim, it necessarily follows that a plaintiff against whom the laches defense is invoked must necessarily have had a known and previously unasserted justiciable claim upon which he or she slept for an unduly long period before seeking judicial relief. Indeed, the courts have consistently held that a plaintiff cannot be held accountable for delay that would amount to laches unless the alleged delay occurred during a period when the plaintiff's claim was ripe for judicial review. *Manheim, supra*; *Kutschinski* v *Zank*, 307 Mich 260; 11 NW2d 881 (1943).

For example, in *Manheim,* the defendant attempted to assert laches as a defense to the plaintiff's claim for the enforcement of a subdivision's restrictive covenants, which prohibited the sale of liquor. In support of his laches defense, the defendant argued that he had owned his property for eight years and had been attempting to obtain a liquor license for over a year prior to the date

when the plaintiff filed suit. The court rejected this formulation of the relevant time period, explaining that the period of alleged delay, for purposes of evaluating the laches defense, would not start to run until the defendant had actually engaged in the sale of liquor and had thus ripened the plaintiff's claim for judicial review. *Manheim, supra* at 556.

Similarly, in *Kutschinski*, the court refused to recognize laches as a proper defense to the plaintiff's claim for specific performance for the conveyance of property that had been owned by her father, prior to his death. The defendant argued that the plaintiff had unduly delayed by not bringing suit until after her father's death. However, the court explained that the plaintiff did not have a contractual right to the disputed property until after her father had died. Thus, her claim for possession did not ripen until her father's death and the period of any alleged delay would not start to run until that time. *Kutschinski, supra* at 271.

Consistent with *Manheim* and *Kutschinski*, the precise and only context in which the Michigan courts have ever applied the laches defense is when the plaintiff slept on a right that had long ago ripened for judicial review. *See*, e.g., *Winogrocki* v *Winogrocki*, 331 Mich 634; 50 NW2d 182 (1951); *Gustin* v *Alpena Power Co*, 307 Mich 241; 11 NW2d 873 (1943) (recognizing laches as a defense to the plaintiff's action for title to land because the defendant had long ago taken open and notorious actions to assert ownership, including the recording of a deed, paying taxes, harvesting timber, granting trapping rights and taking out a mortgage); *Hall* v *Williamson*, 304 Mich 657; 8 NW2d 869 (1943); *Hustina* v *Grand Trunk Western RR Co*, 303 Mich 581; 6 NW2d 902 (1942) (recognizing laches defense where plaintiff had an enforceable contract for a railroad crossing easement for 60 years, but failed during that entire period to sue for enforcement of a covenant that required defendant to construct the crossing); and *City of Jackson* v *Thompson-McCully Co LLC*,

239 Mich App 482; 608 NW2d 531 (2000) (recognizing laches defense where plaintiffs challenged rezoning that had been approved by the city nine years before plaintiff's lawsuit was filed).

In accordance with the foregoing, in order for a defendant to successfully assert laches as a defense under Michigan law, the defendant must demonstrate, not only unreasonable delay with resulting prejudice to the defendant, the defendant must also show that the alleged delay occurred during a time period when the plaintiff was sitting on a justiciable claim that was ripe for judicial review.

Applying the above-stated principles to the present issue, it is obvious that the doctrine of laches cannot plausibly be relied upon to prevent riparian property owners from asserting title to their property to the water's edge. The reasons for this are discussed below.

1. The Mere Passage Of The GLSLA Does Not Create A Justiciable Controversy

Contrary to the argument advanced by Amicus Curiae Tip of the Mitt, neither the adoption of the GLSLA in 1955 nor the subsequent adoption of various amendments to the Act created a justiciable controversy, vis-à-vis the property rights of Great Lakes riparian property owners. This is because the GLSLA, on its face, did not purport to divest those property owners of their rights to the water's edge.

Further, it is important to recognize that in 1955, under the common law of riparian rights, as established in *Hilt* v *Weber*, Great Lakes riparian property owners undoubtedly held title to the water's edge. Under well-established rules of statutory construction, the GLSLA could not be extended by implication to abrogate this common law rule unless it did so in plain and explicit terms. *See Hasty* v *Broughton*, 133 Mich App 107, 113-114; 348 NW2d 299 (1984) ("Legislative amendment of common law is not lightly presumed nor will statutes be extended by implication to abrogate established rules of the common law.").

Because the plain language of the GLSLA did not even remotely suggest an intention to abrogate the common law rule established in *Hilt* v *Weber*, its mere adoption could not plausibly be construed as having created a justiciable controversy that marked the beginning of an alleged delay period for purposes of a laches defense. This conclusion is even further buttressed by the fact that the Michigan courts have consistently refused to attribute to the GLSLA the meaning erroneously attributed to it by Plaintiff and her amici, including Tip of the Mitt. *See*, e.g., *Peterman* v *DNR*, 446 Mich 177; 521 NW2d 499(1994); and *Klais* v *Danowski*, 373 Mich 262; 129 NW2d 414 (1964).

In short, because the plain language of the GLSLA did not purport to alter ownership of the lands below the ordinary high water mark, no justiciable controversy was created thereby and it did not, therefore, start the running of an alleged delay period that could be used to support a laches defense.

2. The Laches Defense Is Not Applicable To A Property Owner Having A Vested Right Secured By Record Title

Michigan courts have generally refused to recognize the defense of laches in situations where the plaintiff had a vested right in real property that was secured by record title:

> "The general rule is that where plaintiff comes into equity for the protection of a vested right, the doctrine of laches has little, if any, application . . .
>
> > 'Where the legal right is not an executory one but is of vested legal title, the doctrine of laches has little, if any, application. 21 CJ, p 215. **This is particularly true where the title is of record for the world to see.**'" *Taylor* v *S S Kresge Co*, 326 Mich 580, 590; 40 NW2d 636 (1950) (quoting *Putnam* v *Tinkler*, 83 Mich 628 (1890); *Dragoo* v *Dragoo*, 50 Mich 573; 15 NW 910 (1883)) [emphasis added].

Applying this rule to the present situation, laches cannot be relied upon to prevent Great Lakes riparian property owners from protecting their ownership rights to the water's edge because those rights are secured by the riparian owners' record title to their properties.

As explained by the Michigan Supreme Court in *Hilt* v *Weber*, when Great Lakes riparian property was originally conveyed from the government to private owners, the private owners took vested title to the water's edge. *Hilt* v *Weber*, 252 Mich at 206. Thereafter, the state could not take away that vested title, or any portion thereof, without the payment of just compensation. *Id.*

Accordingly, all persons who currently own record title to Great Lake riparian lands, which are traceable to the original government conveyance, have a vested record title to the water's edge. In this situation, this Court has clearly stated that laches is of little, if any, use to one who would try to divest that title. *Taylor* v *S S Kresge Co*, *supra*. If Plaintiff and her amici want to divest riparian property owners of title below the statutory "ordinary high water mark," they should not rely on a spurious claim of laches. Instead, they should convince the state to commence eminent domain proceedings and pay just compensation to the rightful owners thereof. *Hilt* v *Weber*, 252 Mich at 206. This has not been done and, therefore, vested title to the water's edge remains in the riparian property owners.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals reached a correct result when it reversed the trial court's decision in this case, and held that Great Lakes riparian property owners have the exclusive right to the use of their property all the way to the water's edge.

Unfortunately, the Court of Appeals failed to fully comprehend that the right to exclusive use was but one incident of the "movable freehold" title held by such owners in their property under *Hilt*, and that the public trust held by the State of Michigan in the submerged lands of the Great Lakes stops where the landowners' title begins: at the water's edge. For that reason, the Court of Appeals' opinion is seriously flawed. Amici Curiae therefore request that the Court affirm the

decision of the Court of Appeals based on the holding in *Hilt* v *Weber* (re-affirmed in *Peterman, supra*) that Great Lakes riparian property owners hold title to the water's edge free of the public trust.

Respectfully submitted,

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